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No. 85-2034

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PAUL KRAMER,

Petitioner,

v.

FRANK E. HORTON, CHANCELLOR OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, ROBERT W. CORRIGAN, DEAN OF THE SCHOOL OF FINE ARTS OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, and GERALD T. MCKENNA, CHAIRMAN OF THE DEPARTMENT OF MUSIC OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRONSON C. LA FOLLETTE
Attorney General of
Wisconsin

DANIEL S. FARWELL
Assistant Attorney General
of Wisconsin

Counsel of Record

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2659

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REASONS FOR NOT GRANTING WRIT

A. State exhaustion requirement.

The issues outlined in the petition do not fulfill the criteria

for review laid out in Rule 17.1(b) or (c) and in the prior decisions of this Court. That is because they do not present a substantial federal question. Rather, the Wisconsin Supreme Court's decision to require exhaustion of available administrative remedies before commencing an action seeking relief under 42 U.S.C. § 1983 in state court was a matter of "judicial administration . . . [which is] rightfully subject to crafting by judges." Patsy v. Florida Board of Regents, 457 U.S. 495, 518 (1982) (White, J., concurring opinion). Moreover, such judicial craftsmanship is within the scope of the state's prerogatives

under the tenth amendment and has not been foreclosed by Congress.[1]

1. No congressional preclusion of state exhaustion rules.

Petitioner's reliance on Patsy's holding that plaintiffs need not exhaust state remedies before seeking relief under § 1983 in federal courts is misplaced in this case. In Patsy it is clear that a majority of the Justices did not find anything fundamentally wrong with an exhaustion rule as such, but

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[1] On page 12 of his brief, petitioner points to conflicts among state appellate courts on the exhaustion issue. This supposedly places this case within Rule 17.1(b)'s criteria for granting a writ of certiorari. However, the division of opinion among various states does not involve a conflict over a federal legal principle. It reflects only diversity of viewpoint on the matter of allocating judicial resources within the respective jurisdictions.

instead found that Congress had intended that aggrieved persons ought to have immediate access to federal courts to vindicate alleged violations of federally protected rights. Congress supposed that there was no state remedy, or if there was one, states would be unable or unwilling to protect individuals or punish violators. Patsy, 457 U.S. at 505. Federal courts were presumed to be havens for the unprotected. But plaintiffs were left to choose the haven believed most conducive of such protection; they could try the state courts or proceed directly to the federal courts for the "supplementary" § 1983 remedy. Patsy, 457 U.S. at 506. Since the § 1983 remedy was supplementary to the state remedy, Congress contemplated that state rules might impose procedural and evidentiary limitations not found in

a federal forum. Certainly, then, Patsy did not confer any substantive right to avoid exhaustion of state-created administrative remedies, but rather governed only the timing of a plaintiff's entry into federal court. As Justice Marshall put it:

> [The] legislative purpose . . . is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts.

Patsy, 457 U.S. at 501 (emphasis added).

In short, on September 4, 1979, the date petitioner filed his suit in state court, the doors of the federal court, just a few blocks down the street, remained wide open. Nothing in the Wisconsin Supreme Court's decision prevented petitioner from entering those federal doors. Its exhaustion rule, applicable to state courts only, does not

conflict with the no-exhaustion rule governing federal court jurisdiction.

2. No Supremacy Clause issue.

It is important to understand that the issue petitioner raises is not whether Wisconsin state courts must apply federal substantive law when entertaining a § 1983 action under their concurrent jurisdiction. That federal substantive law prevails is a point well understood and thoroughly emphasized in the Wisconsin Supreme Court's decisions. See Kramer v. Horton, 128 Wis. 2d 404, 383 N.W.2d 54 (1986) (Petitioner's Appendix at A-1); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977); U. S. Const., art. VI, cl. 2. But the promulgation of an exhaustion rule applicable to entry in state courts violates no federal substantive right

within the scope of the Supremacy Clause. Indeed, no federal question is presented when the state imposes the same procedural limitations on federal claims brought before it as it does on state claims.

Petitioner insinuates that the state's exhaustion rule somehow violates his rights of procedural due process and access to courts. See petitioner's brief, page 16. However, an exhaustion rule is not prohibited under the fifth or fourteenth amendment. If anything, such a rule merely defines and guides the timing and place of due process. This Court has not condemned state laws providing for a state administrative and judicial structure for the airing of grievances and the correcting of errors. In fact, those laws have been encouraged and been given substantial

deference in procedural due process cases. See Davidson v. Cannon, 106 S. Ct. 668 (1986); Daniels v. Williams, 106 S. Ct. 662 (1986); Hudson v. Palmer, 104 S. Ct. 3194 (1984). Those decisions teach that it is federal policy to defer to state procedures, even when the wrong consists of an alleged deprivation of property and liberty interests.

3. Federalism principles are not frustrated.

Petitioner asserts that the state's exhaustion rule frustrates principles of federalism. However, in so arguing, petitioner stands federalism on its head. The source of the state's authority to adopt an exhaustion rule is found in the tenth amendment. One of the state's sovereign prerogatives is the ability to structure its own internal affairs, including the

settlement of disputes amongst its state university faculty over teaching assignments and the allocation of its judicial resources.

Respondents submit the State of Wisconsin has an important interest in not only how, but also when claims for relief are dealt with in its judicial system, even when those claims are grounded in federal substantive law. The Wisconsin Supreme Court's concern for that principle is not of recent origin. In Tecumseh Products Co. v. Wisconsin E. R. Board, 23 Wis. 2d 118, 128, 126 N.W.2d 520 (1964), involving the issue of whether the Wisconsin Employment Relations Board had the authority to adjudicate labor-management disputes in terms of federal substantive law, the court said:

We now turn to the question of whether the W.E.R.B. is authorized to perform this function. The answer to this question depends upon state law. We consider that a state is free to allocate judicial power within its own boundaries as it sees fit, without thereby contravening any federal interests. We think this follows from Dreyer v. Illinois (1902), 187 U.S. 71, 83, 23 Sup. Ct. 28, 47 L. Ed. 79, when the United States supreme court stated:

> "A local statute investing a collection of persons not of the judicial department with powers that are judicial . . . presents no question under the Constitution of the United States. . . . Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."

See also Uphaus v. Wyman (1959), 360 U.S. 72, 79 Sup. Ct. 1040, 3 L. Ed. (2d) 1090.

(Emphasis supplied.)

In this case, the state's exhaustion rule does not conflict with federal substantive law and presents no important federal question for consideration by this court.

B. Adequacy of available remedies.

Petitioner appears to be asserting that an exhaustion requirement is permissible only when there are adequate state remedies. That assertion raises no

reviewable case or controversy. The Wisconsin Supreme Court agrees that those remedies must be adequate and so found in this case.

If, on the other hand, petitioner is arguing that, on the facts of this case, the remedies were inadequate, then his petition should be denied for two reasons. First, petitioner has made no record of the alleged inadequacy. That the available administrative remedy did not yield the result he desired does not mean it was violative of due process.

Second, whether or not those remedies were adequate in light of the interests and circumstances involved is an issue of fact and does not present a substantial federal question.

CONCLUSION

For the reasons set forth above, the petition should be denied.

BRONSON C. LA FOLLETTE
Attorney General of
Wisconsin

DANIEL S. FARWELL
Assistant Attorney General
of Wisconsin

Counsel of Record

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
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